

AN ORDINANCE 2006-06-29-0831

AUTHORIZING THE NEGOTIATION AND EXECUTION OF A PROFESSIONAL SERVICES AGREEMENT IN AN AMOUNT NOT TO EXCEED \$965,586.00, WITH THE FIRM OF FOSTER CM GROUP, INC. TO PROVIDE EVALUATION AND QUALITY CONTROL CONSULTING SERVICES AS THE DESIGN REVIEW TEAM CONSULTANT IN CONNECTION WITH THE \$24,000,000.00 RESIDENTIAL ACOUSTICAL TREATMENT PROGRAM AT SAN ANTONIO INTERNATIONAL AIRPORT.

* * * * *

WHEREAS, the City of San Antonio, Aviation Department is implementing a Residential Acoustical Treatment Program ("Program") pursuant to the approved FAR Part 150 NCP Update, to acoustically treat qualifying homes to meet or exceed the minimum standards prescribed by the Federal Aviation Administration (FAA) and in accordance with the policies, procedures and guidelines published in the Residential Acoustical Treatment Program Policies and Procedures; and

WHEREAS, in October 2004, the City Council approved a contract with THC, Inc. to provide Architectural Engineering and Construction Services, serving as the Acoustical Treatment Consultant ("ATC") under a modified design/build contract in connection with the Residential Acoustical Treatment Program at the San Antonio International Airport; and

WHEREAS, pursuant to Texas Local Government Code §271.119 (g), the City is required to enlist the services of an independent Design Review Team ("DRT") to review plans prepared by the ATC; to have an independent Inspection and Testing Team for construction verification inspection, materials testing; and an independent Air Quality Consultant; and

WHEREAS, in addition, because Federal funds will be utilized on this project FAA requires the City to provide an independent inspection team to provide independent acoustical/air quality testing, and assure that the ATC is performing the acoustical treatment in accordance with the requirements of Residential Acoustical Treatment Program Policies and Procedures and FAA requirements; and

WHEREAS, the DRT will assist the City in the review of the designs prepared by the ATC, provide full time resident inspection pursuant to FAA requirements and perform independent indoor air quality and acoustical testing; and

WHEREAS, the City conducted a qualifications-based solicitation for DRT candidates and selected the above-named company to perform design review services; and

WHEREAS, all proposals received were evaluated by City staff, based on capability, past experience, knowledge and familiarity with similar projects; and

WHEREAS, the City Architect/Engineer Selection Committee and City Staff reviewed the ratings, and recommended that the firm of Foster CM Group, Inc. be selected for negotiation of a contract for this Project based upon its demonstrated ability, qualifications and experience; and

WHEREAS, City staff has negotiated an agreement with Foster CM Group, Inc., to provide design review, inspection and testing services for a fee not to exceed \$965,586.00, which is considered fair and reasonable for the work involved; **NOW THEREFORE:**

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF SAN ANTONIO:

SECTION 1. The City Manager or her designee is authorized to execute a Professional Services Agreement with Foster CM Group, Inc. for provision of design review, inspection and testing services in connection with the Residential Acoustical Treatment Program at the San Antonio International Airport for an amount not to exceed \$965,586.00, in a form substantially similar to the contract which is attached hereto and incorporated herein by reference for all purposes as Attachment 1.

SECTION 2. The amount of \$53,117.00 is appropriated in SAP Fund 51014000, "PFC Capital Improvement Fund", GL account 6102100 "Interfund Transfer Out" entitled Transfer to 33-00170-90-03. The amount of \$53,117.00 is authorized to be transferred from Fund 51014000, entitled "PFC Capital Improvement Fund" to Fund 51099000 entitled "Airport Capital Projects".

SECTION 3. The budget in Fund 51099000, Project Definition 33-00170 entitled "Acoustical Treatment Program" shall be revised by increasing WBS Element 33-00110-90-03, entitled "PFC PayGo-Transfer" from AV-00007-01-01-02", GL account 6101100 - "Interfund Transfer In", by the amount of \$53,117.00.

SECTION 4. The amount of \$212,469.00 is appropriated in SAP Fund 26058000, entitled "Federal Aviation Administration" Internal Order No. 1330000000038, GL account 6102100 "Interfund Transfer Out" entitled "Transfer" to Fund 51099000. The amount of \$212,469.00 is authorized to be transferred to Fund 51099000 entitled "Airport Capital Projects".

SECTION 5. The budget in Fund 51099000 entitled "Airport Capital Projects" Project Definition 33-00170 entitled "Acoustical Treatment Program" shall be revised by increasing WBS Element 33-00110-90-05, entitled "AIP 50-50-Transfer From IO1330000000038", GL account 6101100 - "Interfund Transfer In", by the amount of \$212,469.00.

SECTION 6. The budget in fund 51099000, Project Definition 33-00170, "Acoustical Treatment Program", shall be revised by increasing WBS element 33-00170-90-05 entitled "Transfer From I/O # 1330000000038", GL account 6101100 - "Interfund Transfer In", by the amount of \$212,469.00.

SECTION 7. The budget in fund 51099000, Project Definition 33-00170, "Acoustical Treatment Program", shall be revised by decreasing WBS element 33-00170-05-07 entitled "Unallocated Appropriations", GL account 5201040, by the amount of \$700,000.00 and allocating to the following WBS elements accordingly.

SECTION 8. The amount of \$607,265.00 is appropriated in Fund 51099000, Project Definition 33-00170 entitled "Acoustical Treatment Program", WBS Element 33-00170-01-04-01 entitled "Inspection Fees"; General Ledger 5501085, and is authorized to be encumbered and made payable to Foster CM Group, Inc., for inspection services.

SECTION 9. The amount of \$246,190.00 is appropriated in Fund 51099000, Project Definition 33-00170 entitled "Acoustical Treatment Program", WBS Element 33-00170-01-04-02 entitled "Design Review Fees"; General Ledger 5201170, and is authorized to be encumbered and made payable to Foster CM Group, Inc., for design review services.

SECTION 10. The amount of \$112,140.00 is appropriated in Fund 51099000, Project Definition 33-00170 entitled "Acoustical Treatment Program", WBS Element 33-00170-01-04-03 entitled "Testing Fees"; General Ledger 5201170, and is authorized to be encumbered and made payable to Foster CM Group, Inc., for testing services.

SECTION 11. The financial allocations in this Ordinance are subject to approval by the Director of Finance, City of San Antonio. The Director of Finance may, subject to concurrence by the City Manager or the City Manager's designee, correct allocation to specific SAP Fund Numbers, SAP Project Definitions, SAP WBS Elements, SAP Internal Orders, SAP Fund Centers, SAP Cost Centers, SAP Functional Areas, SAP Funds Reservation Document Numbers, and SAP GL Accounts as necessary to carry out the purpose of this Ordinance.

SECTION 12. This Ordinance shall be effective on or after the tenth (10th) day after passage.

PASSED AND APPROVED this 29th day of June, 2006.

For .

M A Y O R

PHIL HARDBERGER

ATTEST:

Leticia M. Vaca
City Clerk

APPROVED AS TO FORM:

Jim Zerkow
for City Attorney

Agenda Voting Results

Name: 29

Date: 06/29/06

Time: 07:25:12 PM

Vote Type: Multiple selection

Description: An Ordinance authorizing the negotiation and execution of a Professional Services Agreement in an amount not to exceed \$965,586.00, with the firm of Foster CM Group, Inc. (FCMG) to provide evaluation and quality control consulting services as the Design Review Team Consultant in connection with the \$24,000,000.00 Residential Acoustical Treatment Program at the San Antonio International Airport. [Presented by Mark Webb, Director, Aviation; Roland A. Lozano, Assistant to the City Manager]

Voter	Group	Status	Yes	No	Abstain
ROGER O. FLORES	DISTRICT 1	Not present			
SHEILA D. MCNEIL	DISTRICT 2	Not present			
ROLAND GUTIERREZ	DISTRICT 3		x		
RICHARD PEREZ	DISTRICT 4		x		
PATTI RADLE	DISTRICT 5		x		
DELICIA HERRERA	DISTRICT 6		X <i>92</i>		
ELENA K. GUAJARDO	DISTRICT 7		x		
ART A. HALL	DISTRICT 8		x		
KEVIN A. WOLFF	DISTRICT 9		x		
CHIP HAASS	DISTRICT_10		x		
MAYOR PHIL HARDBERGER	MAYOR	Not present			

ATTACHMENT 1

**PROFESSIONAL SERVICES AGREEMENT
FOR
DESIGN REVIEW, TESTING & INSPECTION RELATING TO THE RESIDENTIAL
ACOUSTICAL TREATMENT PROGRAM FOR SAN ANTONIO INTERNATIONAL AIRPORT**

This Agreement is made and entered into by and between the **City of San Antonio** (hereinafter referred to as "City"), a Texas Municipal Corporation acting by and through its City Manager, pursuant to Ordinance No. _____, passed and approved on the _____ day of _____, 2006 and **Foster CM Group, Inc.**, by and through its designated officer(s) pursuant to its by-laws or a resolution of its Board of Directors. (hereinafter referred to as "DRT"), both of which may be referred to herein collectively as the "Parties", to provide **Design Review, Testing & Inspection Relating To The Residential Acoustical Treatment Program** at the San Antonio International Airport.

WHEREAS, the City Council of the City of San Antonio by Ordinance No. _____, approved the selection of an independent Design Review Team ("DRT") and authorized the negotiation and execution of a multi-year Agreement substantially similar to this form, for performance in accordance with the terms of this Agreement; and

WHEREAS, the City of San Antonio, Aviation Department is implementing the Residential Acoustical Treatment Program (herein referred to as "Program") pursuant to the approved FAR Part 150 NCP Update. The intent of this Program is to acoustically treat qualifying homes to meet or exceed the minimum standards prescribed by the Federal Aviation Administration (FAA) and in accordance with the policies, procedures and guidelines published in the Residential Acoustical Treatment Program Policies and Procedures; and

WHEREAS, the City has selected an Acoustical Treatment Consultant ("ATC") to work in conjunction with City staff in the implementation of this Program. Pursuant to Texas Local Government Code §271.119 (g), the City is required to enlist the services of an independent Design Review Team ("DRT") to review plans prepared by the ATC; to have an independent Inspection and testing Team (IT) for construction verification inspection, materials testing; and an independent Air Quality Consultant (IAQ); and

WHEREAS, the DRT will assist the City in the review of the designs prepared by the ATC, provide full time resident inspection pursuant to FAA requirements and perform independent indoor air quality and acoustical testing; and

WHEREAS, the City has conducted a qualifications-based solicitation for DRT candidates and selected the above-named company to perform design review services.

IN CONSIDERATION of the mutual covenants, terms, conditions, privileges and obligations herein contained, City and DRT do hereby agree as follows:

I. DEFINITIONS

As used in this Agreement, the following terms shall have meanings as set out below:

1.1 Acoustical Treatment Consultant or "ATC" is defined as THC, INC., or such other firm contracted by the City take the lead on the Program development and management.

1.2 "City" is defined in the preamble of this Agreement and includes its successors and assigns. Whenever this Agreement calls for approval by City, unless otherwise stated herein, such approval shall be in writing and signed by the Director of City's Aviation Department, or his designee.

1.3 "Day" is defined as calendar day unless specifically referred to otherwise.

1.4 "Director" shall mean the Director of City's Aviation Department.

1.5 "Program" is defined as the overall Program for Residential Acoustical Treatment.

1.6 "Project" means the *Design Review, Testing & Inspection Relating To the Residential Acoustical Treatment Program* at the San Antonio International Airport for which DRT's professional services, as set forth in the Scope of Services, are to be provided pursuant to this Agreement.

1.7 "Proposal" is defined as the Consultant's previously submitted written Proposal to the City for the performance of Design Review Services dated _____ 2006, which is attached hereto as **Exhibit "A"** and incorporated herein by reference as if fully set forth.

II. TERM

2.1 This Agreement shall take effect on the eleventh (11th) calendar day after it is approved by the San Antonio City Council, or upon execution by both parties, whichever date is later, ("Effective Date"), and continue in full force and effect for a period of two (2) years thereafter.

2.2 If funding for the entire Project is not appropriated at the time this Agreement is entered into, City retains the right to terminate this Agreement at the expiration of each of City's budget periods, and any subsequent contract period is subject to and contingent upon such appropriation.

III. COMPENSATION

3.1 For and in consideration of the services to be rendered by DRT, City shall pay DRT a fee not to exceed that set forth in this Article V, COMPENSATION. Nothing contained in this Agreement shall require City to pay for any unsatisfactory work, as determined by Director, or for work that is not in compliance with the terms of this Agreement. City shall not be required to make any payments to DRT at any time DRT is in default under this Agreement.

3.2 Total Fee: The total fee for DRT's work as defined in the Scope of Services shall not exceed the sum of **Nine Hundred Sixty Five Thousand Five Hundred Eighty Six and 00/100 Dollars (\$965,586.00)** for labor and reimbursable expenses, ("Total Fee"), without a written amendment to this Agreement. 5.7 Payments shall be made to the DRT in accordance with the Fee Schedule which is attached hereto as "**Exhibit C**" and incorporated herein by reference as if fully set forth. For services performed under this agreement, the fees paid to the DRT shall be compensated monthly by the City based upon actual personnel base hourly rates, and hours of service provided by the DRT and its sub-consultants multiplied by fixed overhead and fixed profit rate, direct labor multipliers and hours per month. The scope and quantity of the services provided will be dependent upon services actually authorized and required by the City. Charges

will be assessed only for actual services rendered. The DRT shall notify the City when the DRT fees incurred to date equal 80% of the maximum limitation set forth in Section 5.2 or any later established funding level.

3.3 Modifications DRT and City acknowledge that the Total Fee, as set out above, has been established based upon the total estimated costs of services to be rendered under the Agreement. Compensation for additional services shall be subject to renegotiation in accordance with Section 3.4 below.

3.4 Additional Professional Services Both the City and the DRT agree that additional professional services may be required for the Project based upon the duration of construction activities, extended working hours by the DRT, and additional services required by the City, and that this Contract may be amended (with prior City Council approval and appropriation) to increase the Scope of Work to include said additional services upon mutual agreement of the parties documented in writing as to the necessity and reasonableness of the amended scope of work, period of service, and fees for such additional services.

3.5 Compensation for Additional Professional Services. Compensation for such additional services shall be subject to prior City Council appropriation by separate City Ordinance, of any additional funds required to cover such services. Should DRT be directed in writing by Director to perform these services, compensation shall be paid by City to DRT as authorized in writing by Director.

3.6 Invoicing for Services. Certified invoices shall be submitted monthly for work performed and completed which has not been included on previous invoices, accompanied by a written progress report outlining the actual work performed by the DRT for the billing period reflected in the invoice. Payment of undisputed amounts invoiced shall be made within thirty (30) days of the date of submission of a mathematically correct invoice. Any prior invoice that requires correction due to an under or overpayment by City will be corrected in the month following discovery of the error. The City reserves the right in the future to require electronic submittal of invoices to expedite processing of same.

3.7 Reimbursement Requests.

3.7.1 Portions of DRT's services are to be funded by federal grant or loan moneys, and allowable costs shall be in accordance with the cost principles and procedures set forth in the applicable Federal Acquisition Regulations, if required by the Funding Agency. It shall be the responsibility of the DRT to ensure that all its sub-consultants also be in compliance with such provisions Federal Acquisition Regulations.

3.7.2 The City shall reimburse the DRT monthly at actual costs for expenses the DRT incurs in support of the Program to include, but not be limited to printing, work-specific vehicle mileage (to be reimbursed in accordance with the most current IRS guidelines); and travel expenses. Routine, daily travel expenses of DRT's San Antonio-area employees to and from the Program office(s) and Project(s) in their personal vehicles are non-reimbursable. Any DRT employee travel expenses using their personal vehicle while on official Program business traveling from Project to Project, Program office-to-office, or in support of a Project are reimbursable.

3.7.3 DRT shall submit reimbursement requests to the Aviation Department prior to the purchase or commitment to purchase or expend money. The request shall show the cost, justification and line item from which the request will be charged. A summary sheet shall be attached to each request which shall track all approved expenses.

3.8 Invoicing Procedures Generally.

3.8.1 DRT shall submit five (5) original certified invoices subdivided by Project and detailed to show the names of the DRT employees, their classification and rates of pay, the time worked and the overhead rates. A separate component of each invoice shall cover reimbursable and direct expenses chargeable and identifiable to this Agreement. Any charges submitted by the DRT must be substantiated by documentation. Reimbursable and direct expenses will be disallowed if invoice support materials are inaccurate or inadequate, or City audit(s) reveal that adequate bookkeeping has not been maintained by the DRT. It is understood that the DRT's accounting records must segregate reimbursable and direct expenses out of its general overhead figures.

3.8.2 The DRT's invoice format and back-up materials required by the Director for expeditious approval and payment of the invoices shall be reviewed and approved by the Director or his designee prior to submittal of the initial invoice by the DRT. The DRT can then assume that all future invoices will be prepared and approved based upon the approved initial format and back up, unless directed otherwise by the City.

3.8.3 Final payment, constituting the final monthly payment of the DRT's compensation, shall be paid by the City to the DRT thirty (30) days after the termination of the contract and acceptance by the City. City may offset or adjust the amount of final payment to correct any previous over and under payments and any accounting errors.

3.8.4 The DRT may be requested to perform additional Program services that are not included within Article 3 Scope of Services; subject to appropriations having been made therefore, in connection with this Agreement. Should the DRT be requested in writing by Director to perform additional services, compensation shall be paid by City to the DRT as authorized in writing by Director.

3.8.5 City, as a public entity, has a duty to document the expenditure of public funds. The DRT acknowledges this duty on the part of City. To this end, the DRT understands that failure of the DRT to substantially comply with the submittal of the statements and documents as required herein shall constitute a WAIVER of reimbursement rights by the DRT to any portion of the fee for which DRT did not supply such necessary statements and/or documents.

IV. SCOPE OF SERVICES

4.1 DRT, in consideration for the compensation herein provided, shall render design review, testing & inspection services in connection with the Project. The DRT shall serve as the independent evaluation and quality control element for the City of San Antonio Aviation Department's Acoustical Treatment Program ("ATP"). The Scope of Services for this project is broken down into three basic elements: Design Review, Construction Inspection Services and Testing. For purposes of establishing scope and fees, it is assumed that the work effort is based on 224 homes and will have a construction period of 253 working days.

4.2 The DRT shall provide the necessary personnel and resources to perform the following tasks:

4.2.1 Task 1 – Design Review Review the design documents provided by the Acoustical Treatment Consultant (“ATC”) for code compliance, industry standard acoustical design practices and confirmation of FAA funding eligibility criteria. This review will be documented and consolidated into a design review report, which will cite the relevant local, state, and federal codes or regulations if discrepancies are noted; and if appropriate, provide the Aviation Department and the ATC with recommended corrective action.

4.2.2 Task 2 – Construction Inspection The DRT will provide a qualified construction Resident Engineer (“RE”) to observe and assure that the construction is carried out in reasonable conformity with the contract documents, and in accordance with the customary practices of professional engineers and consultants. The RE will be the DRT’s primary contact with the ATC and the ATC’s sub-consultants during the course of construction. The RE will be available to meet with the representatives of the City, the FAA, the ATC, the homeowners and other stakeholders at the project locations. The RE will coordinate and supervise the ATC’s sub-consultants and personnel who are performing project related services. The RE will be responsible for the following:

- Monitoring and coordination of the construction progress.
- Providing construction oversight to ensure that the work is proceeding according to the construction contract documents; and notification of the City if problems, disputes, or changes arise during the course of construction.
- Preparing daily construction progress reports of the construction activities that are observed and submission of a report of such activities to the City for review.
- Preparation of a weekly FAA construction summary report of completed work that has been accepted and approved.

4.2.3 Task 3 – Testing The testing element has two parts: acoustical compliance and interior air quality. This testing will be accomplished by personnel with extensive experience in each specialty.

- Acoustical Compliance Testing: The DRT will provide acoustical testing based upon six trips to perform testing of 10% of the completed homes, along with evaluation of testing reports prepared by the ATC.
- Interior Air Quality Testing: The DRT will provide Interior air quality post-testing on 112 homes while providing pre-test monitoring on 34 homes. These tests shall be performed in order to validate the acoustical performance of the installed products and to serve as verification of the design, as well as correct installation.

4.3 DRT shall complete all Project work in compliance with this Agreement, in a timely fashion consistent with the construction schedule and agrees to staff the Project with sufficient necessary, qualified personnel to the Project, in order not to delay or disrupt the progress of the Project.

V. OWNERSHIP AND RETENTION OF DOCUMENTS AND ACCESS TO TEST RESULTS

5.1 Upon completion or termination of the Project, or upon request by the City, all documents, information, work product, and correspondence, in whatever form, given to,

prepared or assembled by the DRT in connection with its performance of its duties under this Agreement shall become the sole property of the City, and shall be promptly delivered to City in a reasonably organized form at no cost and without restriction on future use. Documents and information covered by this paragraph shall include, but not be limited to, reports, test results, field notes and other data. The City shall have free and immediate access to all such information at all times during the term of this Agreement with the right to make and retain copies documents, notes and data, whether or not the Project has been completed. Prior to surrender of the documents and information, DRT may make copies of any and all documents for its files, at its sole cost and expense. Any materially significant Work product lost or destroyed by the DRT shall be replaced or reproduced at the DRT's sole cost.

5.2 At any time during the Project, the City shall have the right to unrestrained direct access and contact with testing facilities, if any, used by DRT for work performed by DRT under this Agreement; and the City shall have the unrestricted right to obtain original or duplicate copies of reports and testing results directly from the lab or testing facility, if any, used by DRT.

5.3 The DRT agrees to maintain all books, records and reports required under this contract for a period of not less than three (3) years after final payment is made and all pending matters are closed. In addition, the DRT shall maintain an acceptable cost accounting system during the term of this Agreement. The DRT agrees to provide the City, the Federal Aviation Administration and the Comptroller General of the United States, or any of their duly authorized representatives, access to any books, documents, papers and records of the Contractor which are directly pertinent to this Agreement for the purpose of making audit, examination, excerpts and transcriptions.

5.4 DRT shall notify City, immediately, in the event the DRT receives any request for information from a third party, which pertain to the documentation and records referenced herein. DRT understands and agrees that City will process and handle all such requests.

5.5 All rights to inventions and materials generated under this contract, if any, are subject to regulations issued by the FAA and the Sponsor of the Federal grant under which this contract is executed. Information regarding these rights is available from the FAA and the City.

VI. POTENTIAL AGREEMENT EXTENSION

6.1 If the Program is substantially delayed at any time in the orderly progress of the Work by any act, neglect or failure to act by the City, or by major City-directed Change Order in the design Work or Field Alteration in the construction Work, or by labor disputes, fire, unusual delay in transportation, unavoidable casualties or any causes beyond the DRT's reasonable control, or by delay authorized or directed by the City, the DRT shall immediately notify the City, in writing, of such delay. The date for Completion of DRT's services may be extended, upon mutual agreement between the City and the DRT, by Change Order for a reasonable length of time. However, such extension, if necessary, will be granted only if the delay cannot reasonably be recovered elsewhere in the Program Management Schedule, without significant cost impact to the Program.

VII. TERMINATION OF AGREEMENT

7.1 Termination Without Cause.

7.1.1 This Agreement may be terminated by City without cause, prior to Director giving DRT written Notice to Proceed, should Director, in his sole discretion, determine that it is not in City's best interest to proceed with this Agreement. Such notice shall be provided in

accordance with the notice provisions contained in this Agreement, and shall be effective immediately upon delivery to the DRT.

7.1.2 This Agreement may be terminated by the City at any time after issuance of the Director's Notice to Proceed, either for the City's convenience or because of DRT's failure to fulfill the contract obligations. Upon receipt of such notice services shall be immediately discontinued (unless the notice directs otherwise) and all materials as may have been accumulated in performing this contract, whether completed or in progress, delivered to the City.

7.1.3 If the termination is for the convenience of the City, and following inspection and acceptance of DRT's services properly performed prior to the effective date of termination an equitable adjustment in the contract price shall be made. DRT shall not, however, be entitled to lost or anticipated profit on unperformed services, should City choose to exercise its option to terminate, nor shall DRT be entitled to compensation for any unnecessary or unapproved work, performed during time between the issuance of the City's notice of termination and the actual termination date.

7.1.4 If the termination is due to DRT's failure to fulfill its obligations, the City may take over the work and prosecute the same to completion by contract or otherwise. In such case, the DRT shall be liable to the City for any additional cost occasioned to the City thereby.

7.1.5 If, after notice of termination for failure to fulfill contract obligations, it is determined that the DRT had not so failed, the termination shall be deemed to have been effected for the convenience of the City. In such event, an equitable adjustment in the contract price shall be made as provided in paragraph 7.1.3 of this clause.

7.1.6 The rights and remedies of the sponsor provided in this clause are in addition to any other rights and remedies provided by law or under this contract.

7.1.7 This Agreement may be terminated by the DRT, at any time after issuance of the Director's Notice to Proceed, upon ninety (90) calendar days written notice provided in accordance with the Notice provisions contained in this Agreement.

7.2 Defaults With Opportunity for Cure. Should DRT fail, as determined by the Director, to satisfactorily perform the duties set out in Article III. SCOPE OF SERVICES; or comply with any covenant herein required, such failure shall be considered an Event of Default. In such event, the City shall deliver written notice of said default, in accordance with the notice provisions contained in this Agreement, specifying the specific Events of Default and the action necessary to cure such defaults. DRT shall have ten (10) calendar days after receipt of the written notice to cure such default. If DRT fails to cure the default within such cure period, or take steps reasonably calculated to cure such default, City shall have the right, without further notice, to terminate this Contract in whole or in part as City deems appropriate, and to contract with another DRT to complete the work required by this Agreement. City shall also have the right to offset the cost of said new agreement with a new DRT against DRT's future or unpaid invoice(s), subject to any statutory or legal duty, if any, on the part of City to mitigate its losses.

7.3 Termination For Cause. Upon the occurrence of one (1) or more of the following events, and following written notice to DRT given in accordance with the notice provisions contained in this Agreement, City may immediately terminate this Contract, in whole or in part, "for cause":

7.3.1 DRT makes, directly or indirectly through its employees or representatives, any material misrepresentation or provides any materially misleading information to City in connection with this Agreement or its performance hereunder; or

7.3.2 DRT violates or materially fails to perform any covenant, provision, obligation, term or condition of a material nature contained in this Agreement, except those events of default for which an opportunity to cure is provided herein; or

7.3.3 DRT fails to cure, or initiate steps reasonably calculated to cure, a default listed in Section 9.3 below, within the time period required for cure; or

7.3.4 DRT violates any rule, regulation or law to which DRT is bound or shall be bound under the terms of this Agreement; or

7.3.5 DRT attempts the sale, transfer, pledge, conveyance or assignment of this Agreement contrary to the terms of the Agreement; or

7.3.6 DRT ceases to do business as a going concern; makes an assignment for the benefit of creditors; admits in writing its inability to pay debts as they become due; files a petition in bankruptcy or has an involuntary bankruptcy petition filed against it (except in connection with a reorganization under which the business of such party is continued and performance of all its obligations under this Contract shall continue) and such petition is not dismissed within forty-five (45) days of filing; or if a receiver, trustee or liquidator is appointed for it, or its joint venture entity, or any substantial part of DRT's assets or properties.

7.4 Termination By Law. If any state or federal law or regulation is enacted or promulgated which prohibits the performance of any of the duties herein, or, if any law is interpreted to prohibit such performance, this Agreement shall automatically terminate as of the effective date of such prohibition.

7.5 Orderly Transfer Following Termination. Regardless of how this Agreement is terminated, DRT shall effect an orderly transfer to City or to such person(s) or firm(s) as the City may designate, at no additional cost to City. Upon the effective date of expiration or termination of this Agreement, DRT shall cease all operations of work being performed by DRT, or any of its subcontractors, pursuant to this Agreement. All completed or partially completed documents, papers, records, charts, reports, and any other materials or information produced, or provided to DRT, in connection with the services rendered by DRT under this Agreement, regardless of storage medium, shall be transferred to City. Such record transfer shall be completed within thirty (30) calendar days of the termination date and shall be completed at DRT's sole cost and expense. Payment of compensation due or to become due to DRT is conditioned upon delivery of all such documents.

7.6 Claims for Outstanding Fees. Within forty-five (45) calendar days of the effective date of completion, or termination or expiration of this Agreement, DRT shall submit to City its claims, in detail, for the monies owed by City for services performed under this Agreement through the effective date of termination. **Failure by DRT to submit its claims within said forty-five (45) calendar days shall negate any liability on the part of City and constitute a Waiver by DRT of any and all right or claims to collect moneys that DRT may rightfully be otherwise entitled to for services performed pursuant to this Agreement.**

7.7 Termination not sole remedy. In no event shall City's action of terminating this Agreement, whether for cause or otherwise, be deemed an election of City's remedies, nor shall such termination limit, in any way, at law or at equity, City's right to seek damages from or otherwise pursue DRT for any default hereunder or other action.

VIII. SUSPENSION OF WORK UNDER AGREEMENT

8.1 Right of City to Suspend. City may suspend this Agreement for any reason, with or without cause upon the issuance of written Notice of Suspension in accordance with the Notice provisions contained in this Agreement. Such suspension shall take effect upon the date specified in such notice; provided, however, such date shall not be earlier than the tenth (10th) day following receipt by DRT of said notice. The Notice of Suspension will set out the reason(s) for the suspension and the anticipated duration of the suspension, but will in no way guarantee the total number of days of suspension.

8.2 DRT's Right to Terminate In Event of Suspension of Agreement. In the event such suspension exceeds one hundred and twenty (120) calendar days, DRT shall have the right to terminate this Agreement. DRT may exercise this right to terminate by issuing a written Notice of Termination to the City, delivered in accordance with the Notice provisions contained in this Agreement after the expiration of one hundred and twenty (120) calendar days from the effective date of the suspension. Termination pursuant to this paragraph shall become effective immediately upon receipt of said written notice by City and such termination shall be subject to all the requirements set out in Paragraphs 7.5 and 7.6 above, related to the Orderly Transfer and Fee Payment.

8.3 Procedures Upon Receipt of Notice of Suspension.

8.3.1 Upon receipt of a notice of suspension and prior to the effective date of the suspension, DRT shall, unless otherwise directed, immediately begin to phase-out and discontinue all services in connection with the performance of this Agreement and shall proceed to promptly cancel all existing orders and contracts insofar as such orders and contracts are chargeable to this Agreement, and prepare a statement showing in detail the services performed under this Agreement prior to the effective date of suspension.

8.3.2 Copies of all completed or partially completed studies, plans and other documents prepared under this Agreement prior to the effective date of suspension shall be prepared for possible delivery to the City but shall be retained by DRT until such time as DRT may exercise the right to terminate.

8.3.3 During the period of Suspension, DRT shall have the option to at any time submit the above referenced statement to the City for payment of any unpaid portion of the prescribed fee for services which have actually been performed to the benefit of the City under this Agreement, adjusted for any previous payments of the fee in question.

8.3.4 In the event DRT exercises its right to terminate this Agreement at any time after the effective Suspension date, DRT shall submit, within forty-five (45) calendar days after receipt by City of DRT's notice of termination (if he has not previously done so) the above referenced statement showing in detail the services performed under this Agreement prior to the effective date of suspension. Failure by DRT to submit its claims within said forty-five (45) calendar days shall negate any liability on the part of City and constitute a Waiver by DRT of any and all right or claims to collect moneys that DRT may rightfully be otherwise entitled to for services performed pursuant to this Agreement.

8.3.5 Upon the above conditions being met, the City's review of the submissions and finding the claimed compensation to be appropriate to the terms of this agreement, the City shall pay DRT that portion of the agreed prescribed fee for those as yet uncompensated services actually performed under this Agreement to the benefit of the City, adjusted for any previous payments of the fee in question.

IX. INSURANCE REQUIREMENTS

9.1 Prior to the commencement of any work under this Agreement, DRT shall furnish an original completed Certificate of Insurance to City's Public Works Department, which shall be clearly labeled ***"Design Review, Testing & Inspection Relating To The Residential Acoustical Treatment Program at the San Antonio International Airport"***, which shall be completed by an agent authorized to bind the named underwriter(s) and their company to the coverage, limits, and termination provisions shown thereon, containing all required information referenced or indicated thereon. The original certificate must have the agent's original signature, including the signer's company affiliation, title and phone number, and be mailed directly from the agent to City. City shall have no duty to pay or perform under this Agreement until such certificate shall have been delivered to City's Public Works Department, and no officer or employee shall have authority to waive this requirement.

9.2 The City reserves the right to review the insurance requirements of this Article during the effective period of this Contract and to modify insurance coverage and limits when deemed necessary and prudent by the City's Risk Manager based upon changes in statutory law, court decisions, or circumstances surrounding this Contract, but in no instance will the City allow modification whereupon the City may incur increased risk.

9.3 DRT's financial integrity is of interest to City, therefore, subject to DRT's right to maintain reasonable deductibles in such amounts as are approved by City, DRT shall obtain and maintain in full force and effect for the duration of this Agreement, and any extension hereof, at DRT's sole expense, insurance coverage written on an occurrence basis, except for professional liability, by companies authorized, approved or admitted to do business in the State of Texas and rated A- or better by A.M. Best Company and/or otherwise acceptable to City, in the following types and amounts:

A. Workers' Compensation Employers' Liability	Statutory \$1,000,000/\$1,000,000/\$1,000,000
B. Commercial General Liability Insurance (public) to include coverage for the following:	
1. Premises/Operations	For Bodily Injury and Property Damage of \$1,000,000 per occurrence; \$5,000,000 General Aggregate, or its equivalent in Umbrella Or Excess Liability Coverage
*2. Independent Contractors	
3. Products/completed operations	
4. Personal Injury	
5. Contractual liability	
*6. Explosion, collapse, underground	*If applicable
*7 Fire Legal Liability	
C. Comprehensive Automobile Liability	
1. Owned/Leased Vehicles 2. Non-Owned Vehicles 3. Hired Vehicles	Combined Single Limit for Bodily Injury and Property Damage of \$1,000,000 per occurrence
D. Professional Liability	
	\$1,000,000 per claim to pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages by reason of any negligent act, malpractice, error or omission in professional services. If written on a claims made basis, DRT shall provide coverage for an additional 25 months after the completion date of the contract.

9.4 The City shall be entitled, upon request and without expense, to receive copies of the policies and all endorsements thereto as they apply to the limits required by the City, and may require the deletion, revision, or modification of particular policy terms, conditions, limitations or exclusions (except where policy provisions are established by law or regulation binding upon either of the parties hereto or the underwriter of any such policies). DRT shall be required to comply with any such requests and shall submit a copy of the replacement certificate of insurance to City at the address provided in this Agreement for Notice, within ten (10) days of the requested change. DRT shall pay any costs incurred as a result of said changes.

9.5 DRT agrees that with respect to the above required insurance, all insurance contracts and Certificate(s) of Insurance will contain the following required provisions:

- Name City and its officers, employees, and elected representatives as additional insureds as respects operations and activities of, or on behalf of, the named insured performed under contract with City, with the exception of the workers' compensation and professional liability policies;
- Provide for an endorsement that the "other insurance" clause shall not apply to the City of San Antonio where City is an additional insured shown on the policy;
- Workers' compensation and employers' liability policy will provide a waiver of subrogation in favor of City.

9.6 When there is a cancellation, non-renewal or material change in coverage which is not made pursuant to a request by City, DRT shall notify City of such and shall give such notices not less than thirty (30) days prior to the change, if DRT knows of said change in advance, or ten (10) days notice after the change, if the DRT did not know of the change in advance. In the event of cancellation or non-renewal, such notice must be accompanied by a replacement Certificate of Insurance. All notices under this Article shall be given to City at the following address:

City of San Antonio
Aviation Department – Planning & Eng
9800 Airport Blvd.
San Antonio, Texas 78216

9.7 If DRT fails to maintain the aforementioned insurance, or fails to secure and maintain the aforementioned endorsements, City may obtain such insurance, and deduct and retain the amount of the premiums for such insurance from any sums due under the Agreement; however, procuring of said insurance by City is an alternative to other remedies City may have, and is not the exclusive remedy for failure of DRT to maintain said insurance or secure such endorsement. In addition to any other remedies City may have upon DRT's failure to provide and maintain any insurance or policy endorsements to the extent and within the time herein required, City shall have the right to order DRT to stop work hereunder, and/or withhold any payment(s) which become due to DRT hereunder until DRT demonstrates compliance with the requirements hereof. A stop work order given to DRT by City in accordance with this Article shall not constitute a Suspension of Work under this Agreement.

9.8 Nothing herein contained shall be construed as limiting in any way the extent to which DRT may be held responsible for payments of damages to persons or property resulting from DRT's or its subcontractors' performance of the work covered under this Agreement.

9.9 It is agreed that DRT's insurance shall be deemed primary with respect to any insurance or self insurance carried by City of San Antonio for liability arising out of operations under this Agreement.

X. INDEMNIFICATION

10.1 DRT (for purposes of this Section referred to as Licensed Engineer) whose work product is the subject of this contract for engineering services and other related professional services, agrees to INDEMNIFY AND HOLD CITY, ITS OFFICERS AND EMPLOYEES, HARMLESS against any and all claims, lawsuits, judgments, costs, liens, losses, expenses, fees (including reasonable attorney's fees and costs of defense), proceedings, actions, demands, causes of action, liability and suits of any kind and nature, including but not limited to, personal injury (including death), property damage, or other harm for which recovery of damages is sought that may **ARISE OUT OF OR BE OCCASIONED OR CAUSED BY LICENSED ENGINEER'S NEGLIGENT ACT, ERROR, OR OMISSION OF LICENSED ENGINEER, ANY AGENT, OFFICER, DIRECTOR, REPRESENTATIVE, EMPLOYEE, DRT OR SUBDRT OF LICENSED ENGINEER AND THEIR RESPECTIVE OFFICERS, AGENTS, EMPLOYEES, DIRECTORS AND REPRESENTATIVES** while in the exercise of performance of the rights or duties under this Agreement.

10.2 The indemnity provided for in this paragraph shall not apply to any liability resulting from the negligence of CITY, its officers or employees, in instances where such negligence causes personal injury, death, or property damage. **IN THE EVENT LICENSED ENGINEER AND CITY ARE FOUND JOINTLY LIABLE BY A COURT OF COMPETENT JURISDICTION, LIABILITY SHALL BE APPORTIONED COMPARATIVELY IN ACCORDANCE WITH THE LAWS OF THE STATE OF TEXAS, WITHOUT, HOWEVER, WAIVING ANY GOVERNMENTAL IMMUNITY AVAILABLE TO THE CITY UNDER TEXAS LAW AND WITHOUT WAIVING ANY DEFENSES OF THE PARTIES UNDER TEXAS LAW.**

10.3 Licensed Engineer shall promptly advise the City, in writing, of any claim or demand against the City or Licensed Engineer known to Licensed Engineer related to or arising out of Licensed Engineer activities under this contract.

10.4 The provisions of this section are solely for the benefit of the parties hereto and not intended to create or grant any rights, contractual or other wise, to any other person or entity.

XI. ENGINEER'S/ARCHITECT'S LIABILITY AND STANDARD OF CARE

11.1 Services provided by DRT under this Agreement will be performed in a manner consistent with that degree of care and skill ordinarily exercised by members of the same profession currently practicing under similar circumstances. Acceptance of the final plans by City shall not constitute nor be deemed a release of the responsibility and liability of DRT, its employees, associates, agents or subcontractors for the accuracy and competency of their testing, reports, assessments or other documents and work; nor shall such acceptance be deemed an assumption of responsibility or liability by City for any defect or error in testing, reports, or assessments and work performed by DRT, its employees, subcontractors, and agents.

XII. DRT'S WARRANTY UNDER THE PROFESSIONAL SERVICES PROCUREMENT ACT

12.1 DRT warrants that it has not employed or retained any company or person other than a bona fide employee working solely for DRT to solicit or secure this Agreement, and that it has not, for the purpose of soliciting or securing this Agreement, paid, compensated, or agreed to pay or compensate, any company or person, other than a bona fide employee working solely for DRT, any fee, commission, percentage, brokerage fee, gift, for any other consideration contingent upon or resulting from the award or making of this Agreement. For breach of the foregoing warranty, the City shall have the right to terminate the Agreement under the provisions of this Agreement. However, breach of the warranty required in this provision constitutes fraud by operation of law; therefore, any DRT found in breach of such warranty, by a final judgment of a Court of Competent Jurisdiction, shall take no compensation under this Agreement for any services rendered and such forfeiture shall not bar the City from pursuit and collection of any and all other damages, at law and in equity, to which it may be justly entitled. This Agreement is entered into under competency requirements of the Texas Professional Services Procurement Act governing municipal employment of engineering and other professionals. Accordingly, DRT further pledges and warrants its best and most competent professional efforts to secure to the City the benefits of the agreement.

XIII. ASSIGNMENT OF RIGHTS OR DUTIES

13.1 By entering into this Agreement, City has approved the use of any subcontractors identified in DRT's Response to City's Request for Qualifications. No further approval shall be needed for DRT to use such subcontractors as are identified in DRT's Response to City's Request for Qualifications.

13.2 Except as otherwise required herein, DRT may not sell, assign, pledge, transfer or convey any interest in this Agreement nor delegate the performance of any duties hereunder, by transfer, by subcontracting or any other means, without the prior written consent of City. Engineering services required by law to be performed by a licensed engineer, or services which, by law, require the supervision and approval of a licensed engineer, may only be subcontracted upon the prior written approval of the San Antonio City Council, by approval and passage of an ordinance therefore. Any other services to be performed under this Agreement may be subcontracted upon the written approval of Director. As a condition of consent, if same is given, DRT shall remain liable for completion of the services outlined in this Agreement in the event of default by the successor DRT, assignee, transferee or subcontractor. Any references in this Agreement to an assignee, transferee, or subcontractor, indicate only such an entity as has been approved by City in accordance with this Article.

13.3 Any attempt to assign, transfer, pledge, convey or otherwise dispose of any part of, or all of its right, title, interest or duties to or under this Agreement, without said written approval, shall be void, and shall confer no rights upon any third person. Should DRT assign, transfer, convey or otherwise dispose of any part of, or all of its right, title or interest or duties to or under this Agreement, City may, at its option, terminate this Agreement as provided herein, and all rights, titles and interest of DRT shall thereupon cease and terminate, notwithstanding any other remedy available to City under this Agreement. The violation of this provision by DRT shall in no event release DRT from any obligation under the terms of this Agreement, nor shall it relieve or release DRT from the payment of any damages to City, which City sustains as a result of such violation.

13.4 DRT agrees to notify Director of any changes in ownership interest greater than thirty percent (30%), or control of its business entity not less than sixty (60) days in advance of the effective date of such change. Notwithstanding any other remedies that are available to City under this Agreement, any such change of ownership interest or control of its business entity may be grounds for termination of this Agreement in accordance with Article VIII, Termination.

XIV. INDEPENDENT CONTRACTOR

14.1 DRT covenants and agrees that (s)he is an independent contractor and not an officer, agent, servant, or employee of City; that DRT shall have exclusive control of and exclusive right to control the details of the work performed hereunder and all persons performing same, and shall be responsible for the acts and omissions of its officers, agents, employees, contractors, and subcontractors; that the doctrine of *respondeat superior* shall not apply as between City and DRT, its officers, agents, employees, contractors, and subcontractors, and nothing herein shall be construed as creating a partnership or joint enterprise between City and DRT.

14.2 No Third Party Beneficiaries - For purposes of this Agreement, including its intended operation and effect, the Parties specifically agree and contract that: (1) this Agreement only affects matters/disputes between the Parties to this Agreement, and is in no way intended by the Parties to benefit or otherwise affect any third person or entity, notwithstanding the fact that such third person or entities may be in a contractual relationship with City or DRT or both, or that such third parties may benefit incidentally by this Agreement; and (2) the terms of this Agreement are not intended to release, either by contract or operation of law, any third person or entity from obligations owing by them to either City or DRT.

XV. NOTICES

- 15.1 Unless otherwise expressly provided elsewhere in this Agreement, any election, notice or communication required or permitted to be given under this Agreement shall be in writing and deemed to have been duly given if and when delivered personally (with receipt acknowledged), or on receipt after mailing the same by certified mail, return receipt request with proper postage prepaid, or three (3) days after mailing the same by first class U.S. mail, postage prepaid (in accordance with the "Mailbox Rule"), or when sent by a national commercial courier service (such as Federal Express or DHL Worldwide Express) for expedited delivery to be confirmed in writing by such courier.

If intended for CITY, to:

City of San Antonio
Attn: Mr. Les Heinen, Project Control Manager
Aviation Department – Planning & Engineering
9800 Airport Blvd
San Antonio, Texas 78216

If intended for DRT, to:

Foster CM Group, Inc.
Attn: Paul Foster, President
8620 N. New Braunfels, Suite 406
San Antonio, TX 78217

With copies to:

San Antonio International Airport
Attn: Mark Webb, Aviation Director and
Winifred Dominguez, Chief Legal Counsel
9800 Airport Blvd.
San Antonio, TX 78216

XVI. CONFLICTS OF INTEREST

16.1 DRT acknowledges that it is informed that the Charter of the City of San Antonio and its Ethics Code prohibit a City officer or employee, as those terms are defined in Section 2-52 of the Ethics Code, from having a financial interest in any contract with City or any City agency such as City owned utilities. An officer or employee has a "prohibited financial interest" in a contract with City or in the sale to City of land, materials, supplies or service, if any of the following individual(s) or entities is a party to the contract or sale: a City officer or employee; his parent, child or spouse; a business entity in which the officer or employee, or his parent, child or spouse owns ten (10) percent or more of the voting stock or shares of the business entity, or ten (10) percent or more of the fair market value of the business entity; a business entity in which any individual or entity above listed is a subcontractor on a City contract, a partner or a parent or subsidiary business entity.

16.2 Pursuant to the subsection above, DRT warrants and certifies, and this Agreement is made in reliance thereon, that it, its officers, employees and agents are neither officers nor employees of City. DRT further warrants and certifies that it has tendered to City's a Discretionary Contracts Disclosure Statement in compliance with City's Ethics Code.

XVII. SOLICITATION

17.1 DRT warrants and represents that he has not employed or retained any company or person, other than a bona fide employee working solely for DRT, to solicit or secure this Agreement, nor paid or agreed to pay any company or person, other than a bona fide employee working solely for DRT, any fee, commission, percentage, brokerage fee, gift, or any other consideration, contingent upon or resulting from the award or making of this Agreement. This representation constitutes a substantial part of the consideration for the making of this Agreement.

XVIII. AIRPORT SECURITY

18.1 To the extent DRT will be responsible for work which necessitates entrance to the Air Operations Area or other secure area of the Airport, this Agreement is expressly subject to the airport security requirements of Title 49 of the United States Code, Chapter 449, as amended ("Airport Security Act"), the provisions of which govern airport security and are incorporated by reference, including without limitation the rules and regulations promulgated under it. DRT is subject to, and further must conduct with respect to its Subcontractors and the respective employees of each, such employment investigations, including criminal history record checks, as the Aviation Director, the TSA or the FAA may deem necessary. Further, in the event of any threat to civil aviation, DRT must promptly report any information in accordance with those regulations promulgated by the FAA, the TSA and the City. DRT must, notwithstanding anything contained in this Agreement to the contrary, at no additional cost to the City, perform under this Agreement in compliance with those guidelines developed by the City, the TSA and the FAA with the objective of maximum security enhancement.

18.2 DRT must comply with, and require compliance by its Subcontractors, with all present and future laws, rules, regulations, or ordinances promulgated by the City, the TSA or the FAA, or other governmental agencies to protect the security and integrity of the Airport, and to protect against access by unauthorized persons. Subject to the approval of the TSA, the FAA and the Aviation Director, DRT must adopt procedures to control and limit access to the Airport Premises utilized by DRT and its Subcontractors in accordance with all present and future City, TSA and FAA laws, rules, regulations, and ordinances. At all times during the Term, DRT must have in place and in operation a security program for the Airport Premises utilized by DRT that complies with all applicable laws and regulations. All employees of DRT that require regular access to sterile or secure areas of the Airports must be badged in accordance with City and TSA rules and regulations.

18.3 Gates and doors located in and around the Airport Premises utilized by DRT that permit entry into sterile or secured areas at the Airports, if any, must be kept locked by DRT at all times when not in use, or under DRT's constant security surveillance. Gate or door malfunctions must be reported to the Aviation Director or the Aviation Director's designee without delay and must be kept under constant surveillance by DRT until the malfunction is remedied.

18.4 In connection with the implementation of its security program, DRT may receive, gain access to or otherwise obtain certain knowledge and information related to the City's overall Airport security program. DRT acknowledges that all such knowledge and information is of a highly confidential nature. DRT covenants that no person will be permitted to gain access to such knowledge and information, unless the person has been approved by the City or the Aviation Director in advance in writing. DRT further must indemnify, hold harmless and defend the City and other users of the Airport from and against any and all claims, reasonable costs, reasonable expenses, damages and liabilities, including all reasonable attorney's fees and costs, resulting directly or indirectly from the breach of Licensee's covenants and agreements as set forth in this section.

XIX. CONTRACT CONSTRUCTION

19.1 All parties have participated fully in the review and revision of this Agreement. Any rule of construction to the effect that ambiguities are to be resolved against the drafting party shall not apply to the interpretation of this Agreement.

XX. FAMILIARITY WITH LAW AND CONTRACT TERMS

20.1 DRT represents that, prior to signing this Agreement; DRT has become thoroughly acquainted with all matters relating to the performance of this Agreement, all applicable laws, and all of the terms and conditions of this Agreement.

XXI. APPLICABLE LAW

21.1 Texas Law. This Agreement shall be governed by and construed in accordance with the laws and court decisions of the State of Texas and venue shall lie in Bexar County, Texas. The obligations of the parties to this Agreement shall be performable in San Antonio, Bexar County, Texas, and if legal action, such as civil litigation, is necessary in connection therewith, exclusive venue shall lie in Bexar County, Texas.

21.2 Federal Law and Funding. DRT acknowledges that this contract is funded, in whole or in part with Federal AIP Grant funds and as such additional federal requirements apply in connection with this contract. These additional provisions are attached hereto as **Attachment C** and incorporated herein by reference as if fully set forth herein.

XXII. SEVERABILITY

22.1 In the event any one or more paragraphs or portions of this Agreement are held invalid or unenforceable, such shall not affect, impair or invalidate the remaining portions of this Agreement, but such shall be confined to the specific section, sentences, clauses or portions of this Agreement held invalid or unenforceable.

XXIII. FORCE MAJEURE

23.1 In the event that performance by either party of any of its' obligations or undertakings hereunder shall be interrupted or delayed by any occurrence and not occasioned by the conduct of either party hereto, whether such occurrence be an act of God or the common enemy or the result of war, riot, civil commotion, sovereign conduct, or the act or conduct of any person or persons not party or privy hereto, then such party shall be excused from performance for a period of time as is reasonably necessary after such occurrence to remedy the effects thereof, and each party shall bear the cost of any expense it may incur due to the occurrence.

XXIV. SUCCESSORS

24.1 This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective heirs, executors, administrators, successors and, except as otherwise provided in this Agreement, their assigns.

XXV. NON-WAIVER OF PERFORMANCE

25.1 A waiver by either Party of a breach of any of the terms, conditions, covenants or guarantees of this Agreement shall not be construed or held to be a waiver of any succeeding or preceding breach of the same or any other term, condition, covenant or guarantee herein contained. Further, any failure of either Party to insist in any one or more cases upon the strict performance of any of the covenants of this Agreement, or to exercise any option herein contained, shall in no event be construed as a waiver or relinquishment for the future of such covenant or option. In fact, no waiver, change, modification or discharge by either party hereto of any provision of this Agreement shall be deemed to have been made or shall be effective unless expressed in writing and signed by the party to be charged. In case of CITY, such changes must be approved by the San Antonio City Council.

25.2 No act or omission by a Party shall in any manner impair or prejudice any right, power, privilege, or remedy available to that Party hereunder or by law or in equity, such rights, powers, privileges, or remedies to be always specifically preserved hereby.

XXVI. ALTERNATIVE DISPUTE RESOLUTION

26.1 In the event there is any dispute between or among the Consultant and City that cannot be resolved as otherwise provided herein, the Parties agree to submit the dispute to a mutually agreeable third party who will assist in mediating the dispute to a satisfactory resolution utilizing the then current construction industry mediation rules of the American Arbitration Association or other mutually agreed to and recognized industry source for such standardized mediation rules, prior to recourse to any other formal dispute resolution procedure. The mediation process may be invoked by either Party on written request and shall not be construed to constitute an admission against interest of the Party requesting mediation. Any mediation shall be confidential and non-binding on the Parties, all costs to be equally borne by the Parties, and no statements made or information exchanged during mediation will be admissible in any future legal or arbitral proceedings without the written consent of the Party producing same or as otherwise allowed by the Texas Rules of Civil Procedure and Evidence. Notwithstanding anything to the contrary in this Agreement, either Party may immediately file suit in a court of competent jurisdiction to obtain equitable relief without resort to mediation, if faced with immediate, irreparable injury, and either party may file suit without resort to mediation if mediation is not completed within 60 days after either party invokes mediation.

XXII. LEGAL AUTHORITY

27.1 The signer of this Agreement for CITY and DRT each represents, warrants, assures and guarantees that he has full legal authority to execute this Agreement on behalf of City and DRT respectively, and to bind City and DRT to all of the terms, conditions, provisions and obligations herein contained.

XXIII. INCORPORATION OF ATTACHMENTS

28.1 DRT understands and agrees that to the extent not previously addressed, all attachments, including appendices thereto, referred to in this Agreement are intended to be and hereby are incorporated herein and specifically made a part of this Agreement for all purposes. Said attachments are as follows:

EXHIBIT "A" (Fee Schedule)

EXHIBIT "B" Federal DBE Program Information

EXHIBIT "C" Mandatory Federal Contract Provisions

XXIX. ENTIRE AGREEMENT

29.1 This Agreement, together with its authorizing ordinance and Attachments, as listed in Article XXXI, Incorporation of Attachments, embodies the complete Agreement of the Parties hereto, superseding all oral or written previous and contemporary agreements between the Parties relating to matters herein; and except as otherwise provided herein, cannot be modified without written consent of the parties and approved by ordinance passed by the San Antonio City Council.

29.2 It is understood and agreed by the Parties hereto that changes in local, state or federal rules, regulations or laws applicable hereto may occur during the term of this Agreement and that any such changes shall be automatically incorporated into this Agreement without written amendment hereto, and shall become a part hereof as of the effective date of the rule, regulation or law.

EXECUTED ON THIS, THE ____ DAY OF _____, 2006.

ATTEST:

CITY OF SAN ANTONIO, TEXAS

City Clerk

By: _____
Sheryl Sculley, City Manager

APPROVED AS TO FORM:

FOSTER CM GROUP, INC.

By: _____
City Attorney

By: _____
Paul Foster, President

Federal Tax ID # _____

Exhibit A
Fee Schedule

For purposes of periodic invoicing, the following tasks and respective fees have been established:

Task 1 – Design Review	\$245,966.00	
Task 2 – Construction Inspection	\$607,256.00	
Task 3 - Testing	\$102,480.00	
Subtotal	\$955,702.00	\$955,702.00
Reimbursables		
Travel	\$ 9,000.00	
Printing	\$ 212.00	
Mileage	\$ 672.00	
Subtotal	\$ 9,884.00	<u>\$ 9,884.00</u>
TOTAL		\$965,586.00